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Jack Fuller

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**Signin' Them Papers:
Summary Punishment in the Military**

by Jack Fuller

Mr. Fuller is a second-year student at Yale Law School and an editor of the *Yale Review of Law and Social Action*. He served 22 months as an enlisted man in the U.S. Army.



He used to be a grocery boy or a graduate student. Now it made no difference which. Now he was a GI, a trooper, marching to his first hour of instruction in military justice.

Bayonet training had ended for the day. He was hoarse from the screaming, from the growling by the numbers. He walked to the cadence. Now he was to learn justice.

*We are Charlie.
WE ARE CHARLIE!
Rough, tough Charlie.
ROUGH, TOUGH CHARLIE!
Ass-kicking Charlie.
ASS-KICKING CHARLIE!*

They chanted as they marched. He sweated under his helmet liner. He leaned under the weight of his M14. The voices carommed off dirty yellow barracks that lined the road. Ass-kicking Charlie. A queer introit to an indoctrination in law.

He had learned that the spirit of the bayonet was to Kill. Now he wondered what would label the spirit of the law. He clenched his teeth at the thought. A few weeks in the Army and he was already cynical as hell.

They had shorn him of his hair, his civilian clothes and most of his self-respect. They had kept him awake the first 48 hours of his military career, told him terrifying stories about the future, about the misery of basic training, the savagery of Vietnam. He had learned his lesson quickly. The spirit of the Army is To Endure.

To Endure you just had to be on your guard constantly, to sneak and slide and make absolutely certain that neither the Army nor anyone in it ever got running room in your soul. So he had learned to stand stoic and take whatever abuse his superiors gave him. He had learned to scream by the numbers, to polish by the numbers, to defecate according to the training schedule. It was as if he had detached a small part of himself and sacrificed it to the Army in order to save the rest. And the Army had gladly accepted the offering. That part of him he had ceded to Army control had become petty, cowering, obsequious and mean. Despite his pacific nature, that one part of him had already learned to fight — if only yet for a place in the chow line.

The company halted in a rolling, sandy field between a pine forest and a corrugated steel classroom. He quickly doffed his helmet liner and pistol belt, arranging them in rank and file on the ground as prescribed. He carefully leaned his M14 against the helmet liner in the same angle and aim as every other rifle in the formation. He stood at attention. On command he doubletimed into the classroom screaming "C-NINE-TWO! C-NINE-TWO!" It was the name of his unit.

"Taaaaake . . . seats."

And the 200-odd men clattered into their desks. Within moments some were already asleep. But he would stay awake this hour, not because the drill sergeants stalked about to enforce attentiveness but because he knew that the rules of military justice were to be the perimeters within which his two-year military marathon would be run.

"All right men, this is your first hour of instructions in military justice. You'll all want to listen careful and take notes. You're expected to know this stuff," said the drill instructor. He introduced a captain, their company commander, who would give the lecture.

The captain explained at length the three kinds of courts-martial: Summary, special and general. The trainees rose to ascending plateaus of awe at the level of hassle that would await them in each more severe procedure. He explained that soldiers have a right to keep silent after being charged with an offense. And he explained that in addition to courts-martial, the Army has a thing called Article 15. It was part of the Uniform Code of Military Justice like the rest, he said, digressing to explain that in this case uniform didn't mean the garments everyone in the room was wearing but rather "all the same" since the code applied to all branches of the armed service.

Article 15, he said, was non-judicial punishment unlike courts-martial. It was the law that gave commanding officers the power to discipline a soldier without going through a court. He said that a commanding officer would always give a soldier a choice between accepting the Article 15 punishment — the extent of which would not be specified in advance — and going before a court-martial. The choice was required by the UCMJ, he said. The soldier would have time to decide, usually 48 hours or less.

If the soldier chose to accept the unspecified punishment he would be required to sign a statement to that effect, though signing the papers did not constitute an admission of guilt.

It "behooves the trooper" to take the Article 15, the captain said, leaning forward on the podium to give an air of intimacy with his troops assembled. He explained why. First, the Article 15 does not "follow you beyond the duty station, while a court-martial becomes a part of your record," he said. Second, the Article 15 does not count as a federal conviction. Third, when a soldier signs the Article 15 documents, the captain said, he does not admit that he was guilty of the offense. He only says he is willing to accept punishment. Finally, the captain said, punishments under Article 15 are less severe than under court-martial jurisdiction.

Then the captain repeated nearly the whole lecture and asked for questions. Some trainees asked some, and the captain repeated parts of the lecture a third time. Then the class was over.

"Fall out and fall in on your weapons," barked the sergeant.

Everyone scrambled for the double doors out of the superheated classroom. As he ran out the door, the soldier nee grocery clerk or graduate student mulled over what had been said. Courts-martial: they were

definitely to be avoided. But the Article 15, that wasn't the same. It wasn't quite so bad, but it could come at any time. It was more like an obstacle in the race than like a perimeter. He hurried to his combat gear. Behind him a sergeant's voice bellowed in mock anger, "You'd better shake it up, troops. Shake it up or you'll be signing them papers."

Signing them papers.¹

The Article 15 is the only contact most servicemen have with military justice. Non-judicial punishment and the threat of it become a regular part of the draftee's (or short-term volunteer's) career. The average soldier who hopes only to endure his two or three years of military service with as few scars as possible probably avoids the kinds of behavior that lead to courts-martial. But behavior that could lead to an Article 15 is virtually unavoidable. Non-judicial punishment is given for badly polished belt buckles, for trivial insolence (real or imagined), for errors on the job, for sloppily-rolled socks. In theory commanding officers may only hand out non-judicial punishment for actual breaches of the Uniform Code of Military Justice (UCMJ), but the system leaves the decision whether there has been a breach largely to the commanding officer himself. In practice, unit commanders use non-judicial punishment as the school-marm used the birch switch. Quick, hard, obdurate.

I

The theory of summary punishment as a disciplinary tool of command did not originate with the adoption of the UCMJ in 1950, of course. Traditionally, all military justice devices were designed primarily to maintain strict discipline.² Despite a refusal by the American Continental Congress in 1775 to include provisions for summary punishment (punishments without trial)³ in the first American Articles of War, General George Washington and other Revolutionary Army commanders nevertheless issued general orders calling for immediate flogging and other summary punishments for such types of misconduct as plundering or firing a weapon without orders. In 1778 General Washington asked Congress for statutory authority to mete out summary punishment. In his letter to Congress of January 29, 1778, he wrote:⁴

There are many little crimes and disorders incident to soldiery, which require immediate punishment and which from the multiplicity of them, if referred to Court Martials, would create endless trouble, and often escape proper notice. These, when soldiers are detected in the fact, by the provost marshals, they ought to have a power to punish on the spot; subject to proper limitations and to such regulations, as the commander in chief according to customs and usages of War, shall, from time to time, introduce.

Congress did not grant the authority. One military commentator has speculated that it may have assumed since Washington had already instituted summary corporal punishment he could continue to do so without explicit statutory authority.⁵ Whether Congress thought legislation superfluous or whether it considered summary punishment at odds with the principles of government it espoused, commanders received no statutory authority to impose summary

punishment until the adoption of the 1916 Articles of War.⁶

In the interim, however, military commanders did not show any skittishness because of the vagueness of their authority to punish summarily. Corporal punishment without trial was common. "One punishment (of the Civil War period) that must have been particularly effective," wrote a military commentator, "was that of staking an offender on the ground and pouring molasses on his hands, feet, and face. Whipping, confinement in the guard house, carrying a ball and chain, and tying up by the thumbs were other punishments awarded to offenders without benefit of a trial."⁷

The 1916 Articles of War authorized three separate types of punishment procedure for miscreant soldiers. Air Force lawyer Colonel F. W. Schwekhardt described them:⁸

1. Punishment imposed by a court-martial in which the voluminous and cumbersome rules of evidence and procedure protecting the accused are the dominant influence.
2. Non-judicial punishment imposed by a commander in which the group interest in speedy, unencumbered discipline dominates.
3. Curtailment of privileges and the withholding of rights on a non-penal basis through authority vested in the commanding officer.

Punishment under Article 104 of the 1916 Act (the predecessor of Article 15) was to be imposed only for minor offenses not denied by the accused. Authorized punishments included reprimand, withholding of privileges such as passes, imposition of extra duty and restriction to quarters. More specific limitations as to punishments authorized were added from time to time after the First World War, and in 1950 Congress codified and adopted the practice of non-judicial punishment in Article 15 of the UCMJ.⁹

II

Against this background of legislation and tradition, Congress in 1962 amended the provisions of Article 15 to increase the punitive authority of commanders and to provide a mandatory review of certain types of punishment by a member of the local Judge Advocate General (JAG) staff. The amended article also provided to the serviceman the right to demand a court-martial instead of Article 15 punishment.¹⁰

Under the current Article 15 the maximum non-judicial punishment for minor offenses by enlisted men depends upon the rank of the commanding officer imposing the punishment. Company-grade officers (in the Army, lieutenants and captains) are authorized

To issue a reprimand.

To restrict a serviceman to quarters for two weeks.

To impose extra duties for two weeks.

To put a serviceman in "correctional custody" for one week.

To put shipboard servicemen on bread and water for three days.

To order a forfeiture of one week's pay.

To detain two weeks pay.

To reduce a serviceman's rank by one pay-grade.¹¹

Field grade officers and above (in the Army, majors and above) are authorized

To issue reprimands.

To order 60-day restrictions to quarters.

To impose extra duty for 45 days.

To put a serviceman in "correctional custody" for 30 days.

To put shipboard personnel on bread and water for three days.

To order forfeiture of one-half a serviceman's pay for two months.

To detain one-half a serviceman's pay for three months.

To reduce the rank of E-4 servicemen and below (in the Army corporal or specialist and below) to the lowest pay grade and of all other enlisted men two pay grades.¹²

A serviceman confronted with an Article 15 has the option of accepting the punishment or demanding a court-martial before officers other than his commander. He is not told the extent of punishment that is to be imposed if he accepts the Article 15. He has the right of appeal to the next higher command after the imposition of punishment.

The option of a court-martial is not available to servicemen attached to or aboard a vessel. This exception was a concession to Navy authorities who insisted that a ship's captain retains "unique responsibilities" for maintaining "morale and discipline aboard ship."¹³

III

Modern argument in favor of non-judicial punishment takes two distinct tacks. On one hand, proponents maintain that military command requires such discretionary authority. The argument is as old as the military itself. It assumes that there is something fundamentally different about justice in the armed services and justice everywhere else. It emphasizes that the group interest in the army must predominate. "Its benefit for society and its purpose is," says Colonel Schweikhardt of military justice, "to direct the attention of the individual to the need for group discipline . . . Personal rights are submerged before the social interests of an organization or community."¹⁴

On the other hand, proponents contend that Article 15 is really a munificent gesture by the military to the serviceman — or at least benign. Article 15 punishment does not lead to a record of federal conviction, proponents claim, and thus leaves the soldier free of any lasting stigma.

Even reform-minded reporter Robert Sherrill, who recommended that military courts be deprived of all criminal jurisdiction, wrote:¹⁵

Article 15 punishments, then, are not always light. They are even severe when one considers that they are handed down by the authority of a single officer sitting in splendid *souverainete absolue* . . . But this system of punishment has the great virtue of not being considered in any way the conviction of a crime. The Article 15 process is not a

part of the court-martial system, so let the military have it.

Proponents point proudly to the serviceman's right to appeal an Article 15 and to his right to demand a court-martial in lieu of an Article 15 to vindicate himself. Rather than a necessary evil accompanying the exigencies of command, they argue, the Article 15 benefits the serviceman who receives it. That GI's ought to be grateful is the tacit corollary.

According to one military commentator on military law, Congress was duly impressed by the "fact that non-judicial punishment would be *less harmful* to the offender than a trial by court-martial . . . (italics in original)." He also writes that it was in this magnanimous mood that Congress amended the Article to include the new review, court-martial option and appeals provisions.¹⁶

Critics and advocates of the military justice system have argued long and hard about the essence of the first rationalization for the Article 15 — the use of military justice as a disciplinary device. Here there will be a mere assumption that commanding officers should have some punitive measures at their disposal, but that those measures ought to be the very minimum incident to the normal and routine operation of a military organization.

The second rationalization for the Article 15 — that it is actually beneficial to the serviceman — has not been adequately examined. Scrutiny of the practical use of the Article 15 shows that it is not only much more malignant than is commonly believed, but that it is the subject of a grave and corrosive misconception.

Non-judicial punishment is primarily the low-ranking enlisted man's curse. During the very first two months of the operation of the amended Article 15, 71 per cent of the cases in which it was used involved men in the lowest three enlisted grades, and more than 97 per cent involved men in the lowest five enlisted grades (these are the only grades ordinarily attainable by draftees and three-year enlistees).¹⁷ By comparison, Army manpower statistics show that on June 30, 1964, servicemen and women in the lowest three enlisted grades accounted for about 41 per cent of total active duty personnel, and the lowest five grades included about 74 per cent of total active duty personnel.¹⁸ Article 15 punishments, swift and summary, fall most often upon those servicemen who have had the least freedom in choosing their lot in the first place.

Flogging and other corporal punishments no longer have a place in military justice's arsenal. However, maximum punishments available to a commanding officer under Article 15 are by any modern standard Spartan. Reduction in pay grade and forfeiture of pay financially cripple the GI who even at full scale earns far less than his civilian peers. Top fines are equivalent to an entire month's pay, one-twelfth of a GI's annual pittance.

"Correctional custody" is little more than a euphemism for imprisonment. More than simply a restriction to quarters, it can mean as much as 30-days imprisonment in a building that is often contiguous with the post stockade and is by regulation designed to

be austere. The windows are blocked with wire mesh or other physical barriers.¹⁹ Guards watch over the "confinee's" activities at all hours. Guards may be armed with nightsticks.²⁰ "Confinees" may be put in hard labor details. This kind of custody at its worst can be about as correctional as a month in the Tombs.

Following some corollary of Parkinson's Law, punishments under Article 15 tend toward the maximum. A story is told about a company commander at Fort Campbell, Ky., who did not believe in saving anything in his disciplinary bag for the worst cases. For his not uncommon penchant for handing out "the max" he received a nickname. One day the telephone in the orderly room rang. It was from the local JAG office. A GI who had received one of the company commander's maximum non-judicial punishments has consulted with JAG lawyers to see if his treatment had been illegally severe. The JAG officer told a clerk who had answered the telephone, "I want to talk with Captain Max." The disciplined GI had given the JAG officer his commander's nickname — it was the only name the GI knew.²¹

The responses available to a GI afflicted with an Article 15 are even more limited in practice than they would seem in the statute. By law as interpreted by the military he has no absolute right to consult an attorney before deciding whether to accept his punishment. "In practice," wrote Army Captain Harold L. Miller in the *Military Law Review*, "assistance of counsel is usually available to Army officers who have been offered punishment under Article 15. However, such assistance is not normally available to enlisted persons . . . Should the Army undertake to provide counsel to all offenders in Article 15 proceedings, it is possible that its legal officers would be overwhelmed by the mass of cases presented them."²²

Much can be made of the opportunity to demand a court-martial and the right to appeal a non-judicial punishment to the next higher command authority after imposition. Robert Rivkin in his *Draftee's Guide to Military Life and Law* recommends, "Always consider an appeal. The infraction for which an Article 15 is given must be an offense against the UCMJ! Always check with the JAG Office to make sure the Article 15 you're getting is not completely lawless."²³ Good advice, but advice rarely heeded. Rivkin knows why. Elsewhere in his book he notes that any action by a GI to stand on his rights must involve a fundamental decision as to whether it is worth the gamble. The spirit of the Army is to endure. The effect of an appeal, a demand for court-martial or even an inquiry at JAG is to make waves. It "behooves the trooper" to take his punishment like a man, carp about it awhile and then forget it. So goes the wisdom of the ordinary GI. And it proves less naive and slavish than it may first appear. The man across the table at an Article 15 proceeding is none other than the commander with whom the accused GI standing at braced attention will have to live long after the Article 15 affair ends. That commander might also have the power and connections to do the GI much more serious harm than

any possible Article 15 punishment would – for example, he may be able to connive orders reassigning the GI to a duty station that is less than pleasant, even less than safe. The commanding officer wields powers over his discipline far more ubiquitous than merely the formal “non-judicial” one. He is at once the GI’s judge, employer, foreman, shop steward, alderman and Fate. A GI playing the odds simply will not call his commanding officer’s bluff. Even for the GI who doesn’t figure the odds, accepting the Article 15 is directly in line with that great and prudent maxim in GI life – Follow the Path of Least Hassle.

Miller recites data that indicate most GIs do not appeal their Article 15s and that show that most GIs do not demand a court-martial. He concludes that “offenders are generally satisfied with the fairness of the punishments imposed by their commanders.”²⁴ On the contrary, the data show that GIs are realists. They know their vulnerability is more certain than their rights. That they accept their punishment is a measure of their rationality not their satisfaction.

Congress placed only minimal limits on the commander’s discretion in administering Article 15s, and the military milieu nearly eradicates even those feeble limits. Procedural safeguards prevent only the most excessive injustices to GIs; only punishments so arbitrary or repetitive as to make life intolerable will in most cases overcome the inertia of the GI psychology. Immature or maladjusted commanders, therefore, have wide leeway for malicious harassment both by imposition of non-judicial punishment and by the threat of it.

Analysed in terms of the situation of a short-term enlisted man as he lives it, Article 15 non-judicial punishment is at best an instrument of authoritarian discipline based on the benevolence of men rather than the rule of law. At worst it is a medium for malice.

Were that all, however, the proponents of Article 15 would still have an argument. Servicemen who fall prey to it at least don’t suffer a permanent scar on their records, do they?

Because of a misconception tacitly sanctioned by the Army, the Article 15 may insidiously damage a GI’s future. The misconception is that an Article 15 does not “follow” the GI beyond the duty station at which he receives it, that its effect disappears automatically. This temporary quality of non-judicial punishment is the very basis of the argument that the GI benefits from Article 15. An Article 15 punishment is not a federal conviction; that much is true. It is not an admission of guilt; that is also true.

But, despite what is taught in military justice classrooms in basic training, despite the shared wisdom of first sergeants and career NCOs and despite the assurances of commanding officers as they urge a GI to “sign the papers,” the Article 15 does become a permanent part of a GI’s military record.²⁵

Army Regulation 27-10 states that records of Article 15s will be expunged when two years elapse, when the GI changes duty station or when punishment is withdrawn. An Army spokesman explained how practical Army policy is fitted to the regulation. He said that

the deletion provision of AR 27-10 is “limited to the forms actually used in the imposition of punishment.” In other words, the regulation pertains only to the forms actually signed by the GI and has no bearing on other records of the punishment. He said notations of Article 15s are erased from the personnel records the GI sees – the so-called Field 201 Form that a GI carries from duty station to duty station to prove he has a past. However, the spokesman said, the notation of non-judicial punishment is entered permanently on the GI’s records “where they are maintained permanently.” The damage is done without the GI even knowing it. The spokesman denied that formal basic training in military justice contained any claims that no permanent record is kept of Article 15s. Nonetheless, that is what is taught at least informally, not only by lecturers on military justice in training but also by some of the savviest old non-commissioned officers in the Army. Army spokesmen admitted that in 1967 the Army, in addition to permanent notation, began filing reports of persons receiving Article 15s on narcotics charges with the Federal Bureau of Narcotics and Dangerous Drugs. The Article 15 does not count as a federal conviction, but when it comes to drug offenses that is about as honest as telling a leukemia patient he doesn’t have the plague.

In its own publications on narcotics use, the Army is less than candid about its reporting procedures. For instance, the Army pamphlet “Drugs and You,” warns that “another mark on you is that a *conviction* in the military service for a marijuana or other drug offense assures that your name and the incident will be reported to the Bureau of Narcotics and Dangerous Drugs where the record of drug offenders is permanently maintained (*italics added*).”²⁶ An Article 15 is not a conviction. But it is reported.

Army spokesmen contend that the Army’s reporting procedure is nothing more than compliance with the duty owed by any federal state or local government organization to keep the federal narcotics agency informed. However, the Air Force, a similar federal government organization, does not feel constrained to issue similar reports, according to an Air Force spokesman. He reported that only when the federal bureau requested specific information about a particular case did it feel obliged to disseminate information about narcotics violations. He stated that the only time this procedure is effected is in cases of spectacular proportions “such as smuggling, exceptionally large amounts confiscated, large scale trafficking, etc.”

Attorneys for the Lawyers Military Defense Committee, a group of lawyers representing GIs in Vietnam, reported in the interview immediately preceding this article that the Article 15 is becoming the common method of dealing with alleged marijuana and even heroin violations in Vietnam. GIs who accept the “benign” punishment of Article 15 rather than seek a vindication in court with the burden of proof on the accusers will be surprised to find their government records permanently scarred with a history of narcotics. No federal offense. No admission of guilt. Just a simple dope record put there by a single man

unrestrained by effective legal procedures.

The munificence argument — an argument that persuades even reform-minded Robert Sherrill — fails for two reasons: first, the GI has much less choice in practice than he is given in theory because of the double role of the officer handing down Article 15 punishment (as judge and direct commander); second, the argument is based on a misconception about the temporary quality of Article 15 punishments.

If, as Sherrill recommends, all criminal cases in the military now heard by courts-martial were turned over to federal courts, the quality of justice affecting most soldiers would still be poor.

Deprived of its magnanimity argument the military may simply retreat to its disciplinary necessity justification of summary punishment. No doubt it will. Perhaps the argument will unfortunately prevail. But in claiming that the Article 15 is a necessary evil, the military will have to concede that it is evil. At the very least, no American serviceman should have to make odds on his future without even knowing his future is at stake.

1 The main character of this sketch is a composite of many draftees I knew in basic training. The scene is from my training unit, Company C, 9th Battalion, 2nd Basic Combat Training Brigade, Fort Bragg, N.C., February through March 1969. The composite is an impressionistic "average soldier" gleaned from my own experiences and long discussions with colleagues in basic training and at later duty stations. Some soldiers reported that lectures they had received on military justice laid more emphasis on the freedom of choice between accepting an Article 15 and demanding court-martial. But most reported emphasis on the benefits of Article 15. For other descriptions of the psychological effects of training and Army duty see Bourne, "Some Observations on the Psychosocial Phenomena Seen in Basic Training", 30 *Psychiatry: Journal for the Study of Interpersonal Processes* 192 (1967), Remarque, *All Quiet on the Western Front* (1928) and Dos Passos, *Three Soldiers* (1921).

2 See I Winthrop, *Military Law and Precedents* 53-54 (1886).

3 This is to be distinguished from summary court-martial in the UCMJ which has some aspects of a trial proceeding.

4 II Writings of Washington 249 (Fitzpatrick ed., 1932).

5 Miller, "A Long Look at Article 15," 28 *Mili Law Rev.* 40 (1965) (hereafter cited as Miller).

6 Act of August 29, 1916, ch. 418, §3, art. 104, 39 Stat. 667.

7 Miller, note 4 *supra*, at p. 41.

8 Schweikhardt, "Non-Judicial Punishment under the Uniform Code of Military Justice," *N.Y. Law Forum* 52 (1959) (hereafter cited as Schweikhardt).

9 Uniform Code of Military Justice, Art. 15, 64 stat. 112 (1950).

10 Uniform Code of Military Justice, Art. 15, 10 U. S. C. Art. 15 (1962).

11 This can only be done when the office imposing the punishment would have had authority to promote the serviceman to the rank from which he is to be reduced. This is of little consequence to the low ranking enlisted man considered in the article.

13 See Leonhardt, "Non-judicial Punishment under the New Article 15 — An Explanation," *The Judge Advocate General's Journal* (1963) p. 27.

14 Schweikhardt, *supra* note 7, at p. 47.

15 Sherrill, *Military Justice is to Justice as Military Music is to Music* 228 (1970 revised ed.).

16 Miller, *supra* note 4, at p. 110-111.

17 Miller, *supra* note 4, at p. 114.

18 "Military Personnel on Active Duty by Grade in which Serving," June 30, 1964, Dept. of Defense Chart P26.)IS. 3.

19 Miller, *supra* note 4, at p. 70-71.

20 Coughlin, "Correctional Custody," 17 *Judge Advocate General's Journal* 44 (1963).

21 Co. A, 51st Eng Bn. (c) (a), at Ft. Campbell, Ky., February, 1970.

22 Miller, *supra* note 4, at p. 101-102.

23 Rivkin, *G. I. Rights and Army Justice: The Draftee's Guide to Military Life and Law* 223 (1970).

24 Miller, *supra* note 4, at p. 109.

25 All information pertaining to Army and Air Force reporting procedures comes from Department of Army and Department of Air Force responses to queries submitted by me via the *Pacific Stars and Stripes* Pentagon correspondent. They are memorialized in two memoranda from the correspondent dated May 30 and June 5, 1970. The Department of Navy did not respond.

26 DOD FS-51, DA MAP 360-602, p. 11.